Indignitas, Heresy and Schism

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V.

Indignitas, heresy and schism: Canon law and the iurisdictio of the mali pastores

Von

Guido Rossi, Cambridge[*])

The present article examines the two-sided concept of *dignitas* and analyses its ethical and legal components – worthiness and aptitude. The contribution focuses on a particularly serious case of *indignitas*, heresy, to highlight the tension between formal *dignitas* and substantial *indignitas* of the heretical bishop not yet condemned. Then, it explores the solution envisaged by Canon lawyers to solve such tension in the gravest case of heresy, that of the pope. Finally, it seeks to explain why such a solution was not viable as such, but it had to be mediated through a figure contiguous yet different from heresy – schism.

Der vorliegende Beitrag untersucht das doppelseitige Konzept der *dignitas* und analysiert seine ethischen und rechtlichen Elemente – Wert und Eignung. Der Beitrag konzentriert sich auf einen besonders wichtigen Fall der *indignitas*, die Häresie, um damit die Spannung zwischen formeller *dignitas* und materieller *indignitas* des noch nicht verurteilten häretischen Bischofs deutlich zu machen. Hierbei wird die Lösung untersucht, die von den Kanonisten für den schlimmsten Fall dieser Spannungslage entwickelt wurde: für die Häresie des Papstes. Schließlich wird zu erklären versucht, warum die dabei gefundene Lösung für sich allein genommen nicht tauglich war, sondern durch eine Figur vermittelt werden, die der Häresie verwandt, aber doch von ihr verschieden war – dem Schisma.

Introductory Remarks

If a Greek philosopher could say that man is the measure of all things, then a medieval jurist would probably say that *iurisdictio* is the measure of all men. *Iurisdictio* was the expression and the measure of any authority. The authority of the ruler stemmed from his function of *iudex*, and it was in such jurisdictional context that the exercise of authority found its legitimation: '*principalis autem actus et precipuus regie potestatis est judicare*'[1]). Since

[*]) I am grateful in particular to David Ibbetson, John Allison and Joseph Canning. All errors that remain are obviously my own.

[1]) Jacobus de Viterbo, De regimine christiano, II.4, ed. Henri-Xavier Arquillère, 1926, p. 189–190; cp. Pietro Costa, Iurisdictio: semantica del potere politico nella pubblicistica medievale: 1100–1433, 1969, p. 159–160.

the first and truest judge was God Himself, judging was somehow divine. The wider the powers of the judge, the closer the resemblance to the divine Judge: '*homo iudex gerit vicem iudicis Dei in iudicando*'[2]). *Iurisdictio* not only expressed authority but also measured it, thus defining one's own personal status. In a relational context, *iurisdictio* was expressed in terms of *maiestas* (i.e., *maioritas*)[3]). '*Maiestas* – says Jacobus de Ravanis – *dicitur quasi maior status*'[4]). *Maiestas* marked an 'unequal relationship'[5]). *Iurisdictio* presupposed hierarchy, as it was exercised by the *maior* on the *minor*. The Canon law principle that an *inferior* could not judge a *superior*[6]) was a corollary of the jurisdictional nature of the relation *maioritas*/*minoritas*. When, on the contrary, *iurisdictio was* used in absolute terms and not in relation to someone else, it was usually expressed in terms of *dignitas*[7]). *Dignitas* represented the personal status of the *iudex* and determined the degree of *iurisdictio* he enjoyed. The higher the *dignitas* of a judge, the greater was his *iurisdictio*.

Dignitas is at the same time an ethical and a legal concept, for it expresses both worthiness and aptitude. It measures reputation and good fame[8]) as much as *iurisdictio* and *auctoritas*. In medieval jurisprudence such ambiguity in the language is not accidental. *Dignitas* is a two-faced notion, whose different employment in the legal and the moral domains is the adaptation of a unitary concept to different purposes. The ambiguity (or, rather, complexity) of *dignitas* becomes all the more apparent in its opposite – *indignitas*. *Indignitas* has two meanings as well. One is ethical, marking the person so qualified as blameworthy. The other is 'functional', and signifies the incapacity of doing, having or enjoying something. Commenting on the *maiores heretici*, Azo does not say that they deserved a more severe punishment, but that they '*maiori et special-*

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[2]) Alexander de Hales, Summae Theologiae, Coloniae Agripinae, 1622, vol. II, pars 3, q. 40, membrum 4, p. 295; cp. Aquinas, De regimine principum, ed. Joseph Mathis, 2nd ed. Turin 1971, 1.1, c. 8, p. 10.

[3]) Marinus de Caramanico, Proemium ad Liber Augustalis, Napoli 2006 (photo reprint of the Naples edition of 1773), p. xxxix.

[4]) Jacopus de Ravanis, ad Dig. 48.4.1 (Vatican ms Pal. lat. 753, fol. 151), transcribed by Gaines Post, Studies in Medieval Legal Thought, Princeton/NJ 1964, p. 341, note 24.

[5]) Richard A. Bauman, The *Crimen Maiestatis* in the Roman Republic and Augustan Principate, Johannesburg 1967, p. 1.

[6]) C. 6, q. 1, c. 20.

[7]) Albericus de Rosate, Vocabolarius utrumque iuris, Parisii 1525, fol. 71, *s.v.* Dignitas.

[8]) Rogerius, Summa Codicis, ad Cod. 1.7, n. 1, in: Scripta Anectoda Glossatorum, ed. Giovanni Battista Palmerio, Bononiae 1913, vol. I, p. 69.

iori sunt poena digni'[9]). Similarly, when reporting the struggle for the imperial throne between Philip of Swabia and Otto, the second son of Henry of Saxony, Bernardus Parmensis notes that the papal legate '*personam philippi reputauit indignam: personam vero ottonis denunciauit idoneam ad imperium obtinendum*'[10]). Just like *indignitas*, *inidoneitas* (a medieval neologism to express the lack of *idoneitas*)[11]), describes the (functional) incapacity to achieve something or to retain it. When commenting on the deposition of the Patriarch of Aquileia Gothofredus, in 1186, for having crowned Henry VI as *Rex Longobardorum* in spite of the papal veto, Alvarus Pelagius observes that, casted outside the Church, the Patriarch became '*inidoneus*' to the episcopate[12]). In these cases the concept of '*dignitas*' is not ethical, but functional and 'technical'.

The two meanings of *indignitas* find a synthesis in the concept of *infamia*. *Infamia* is the nemesis of *dignitas*. *Infamia*, it is known, could be either *facti* or *iuris*. The *Decretum* does not provide a precise definition of either, but describes their main features[13]). When *facti, infamia* conveys a social mark of disesteem[14]); when *iuris,* it entails a *deminutio* in one's own legal status[15]). The two kinds of *infamia*, however, are not extraneous to each other. For that who enjoys a *maior status* (and so a vaster *iurisdictio*) has to be *dignus* of it. Such *dignitas* is at the same time ethical and legal, moral and 'functional', *facti* and *iuris.* The conceptual indivisibility of the notion of *dignitas* postulates a similar unitarity in its practical declination. If good fame entails *illesa dignitas,* ill fame erodes it.

Legal status has to mirror moral values since he who is less worthy cannot enjoy a higher status. Accordingly, disesteem in the ethical and social sphere ought to entail some consequences in the legal domain. Our problem is the legal consequences of the fracture between the two faces of *dignitas*. Such a fracture may occur within the Civil law, when the ruler behaves as a tyrant,

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[9]) Azo, Summa Codicis, Basileæ 1563, ad Cod. 1.5, col. 17, n. 1.

[10]) Bernardus Parmensis, Decretalium compilatio, Lugduni 1526, ad X.1.6.34, fol. 37, ∫ *Venerabilem*.

[11]) See in particular Petrus de Bellapertica, Quaestiones vel distinctiones, Bologna 1970 (photo reprint of the 1517 edition, available online, URL: <http://catalogue.bnf.fr/ark:/12148/cb37284262d>), q. 202, fol. 58; Alexander de Hales, Summae (n. 2), vol. II, pt. 3, q. 40, m. 4, p. 295.

[12]) Alvarus Pelagius, De planctu Ecclesiae, Venetiis 1560, I.65, fol. 85.

[13]) Georg May, Die Infamie in Decretum Gratiani, in: Archiv für katholisches Kirchenrecht [AKKR] 129 (1960), p. 389–408, at p. 389. The two descriptions are in C. 6., q. 1., c. 2 (*infamia iuris*) and in C. 6, q. 1, c. 3 (for *infamia facti*).

[14]) Albericus de Rosate, Vocabolarius (n. 7), fol. 104, *s.v.* Infamia.

[15]) May, Infamie (n. 13), p. 389–392.

or within the Canon law, when the *bonus sacerdos* becomes *malus pastor*. The purpose of this study is to see whether and to what extent an (ethically) *indignus* could retain his (legal) *dignitas* in the medieval legal discourse.

The study will focus on a particularly serious case of *indignitas*, heresy, to highlight the tension between formal *dignitas* and substantial *indignitas* of the heretic not yet condemned. Then, it will explore the solution envisaged by Canon lawyers to solve such tension in the gravest case of heresy – that of the pope. Finally, it will explain why such a solution was not viable as such, but it had to be mediated through a figure contiguous yet different from heresy – schism.

II. Heresy and indignitas in Canon law

The tension between ethical unworthiness and legal status occurs when one enjoys a position he is unworthy of, like the case of the unworthy judge, the *iudex indignus* (or *minus idoneus*). Even in a secular tribunal it would be difficult to accept an immoral judge. But in a religious tribunal, immorality in the judge becomes structurally intolerable because the *maioritas* from which his *iurisdictio* stems is ethical as much as legal. Not being *iustus* (and so lying outside the *ius*) one may not render a judgment (*ius-dicere*)[16]). As Guido de Baysio puts it[17]):

per multa exempla ostendit quod mali non possunt iudicare, quia Deus non audit eorum orationes, ergo nec eorum iudicia

There is hardly anything more reproachable – both ethically and legally – for the Church than refusing its own teachings. Hence, the Church saw in heresy the highest and foremost case of *indignitas*. The heretic's *indignitas* is at the same time moral and legal – unworthiness and unfitness. The heretic is not *dignus* of *ius dicere*. On a legal ground, he ought not to enjoy any *iurisdictio*, for he cannot be *maior* than any faithful Christian. On a moral ground, he ought not to judge, for he is not *iustus*[18]).

The moral reprobation of the Church against heresy is such that it has to entail the legal condemnation of the heretic. There is no apparent fracture between ethics and law in heresy, as they both chastise it with equal vigour. Being unworthy of it, no heretic may be called to any *dignitas*. The tension

[16]) Henricus de Segusia, Lectura siue Apparatus super quinque libris Decretalium, Argentini 1512, vol. I, ad X.1.33.1, fol. 177, ∫ *Cum certus* (available online, URL: <http://nbn-resolving.de/urn:nbn:de:bvb:12-bsb00018039-8>).

[17]) Guido de Baysio, Rosarium seu in decretorum volumen commentaria, Venetiis 1577 (available online, URL: < http://daten.digitale-sammlungen.de/~db/0001/bsb00018030/images>), ad C. 3, q. 7, c. 3, fol. 169, ∫ *In grauibus*, n. 1.

[18]) Alvarus Pelagius, De planctu Ecclesiae (n. 12), I.65, fol. 84.

between the two spheres, however, resurfaces if the moral reprobation creeps in at a later stage, when one becomes heretic while he is already enjoying a *dignitas*. This case goes straight to the core of our problem – the (legal) enjoyment of a *dignitas* by a (morally) *indignus*. There, Canon law's 'reaction' becomes tantalising: the heretic's *indignitas* renders him unworthy of his status, but it does not necessarily deprive him of it. Hence, the *indignus* may remain formally vested in a *dignitas* he ought not to enjoy any longer.

Usually judgments ascribe legal consequences to natural facts. But heresy is a sin, not the status ascribed to the sinner by the ecclesiastical tribunal that condemns him. The effects of a sin manifest themselves immediately into the sinner. The first and foremost consequence of heresy is the separation of the sinner from both the true faith and the unity of the Church, based as it is on the *unitas fidei*[19]). One does not deviate from the true faith because a judgment says so. The judgment merely acknowledges a deviation that has already taken place. The consequences of the sin of heresy are already present and effective at the very moment the sin is committed[20]). Because of its gravity, heresy has to be formally acknowledged, and so its legal effects must but follow the formal condemnation of the heretic. The heretic, however, is not such because of his condemnation. Far from altering one's own status, the condemnation for heresy merely acknowledges the change in it. The purpose of the sentence of excommunication of the heretic, indeed, is to formally ascertain (to 'ratify') a deviation from the faith of the Church that has already taken place[21]). Its function is to acknowledge a fact already in existence and, since that fact is a sin, already producing its effects. In other words, the nature of the judgment of the heretic is declaratory, not constitutive. The heretic deviates from the faith and so from the communion of the Church because of his sin and not because a judicial pronouncement so states[22]):

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[19]) Johannes Teutonicus, Decretum Gratiani, Basileae 1512, ad C. 7, q. 1, c. 16, fol. 174, ∫ *Nihil contra ordinis*; Guido de Baysio, Rosarium (n. 17), ad C. 4, q. 1, c. 2, fol. 173, ∫ *Quod autem*, n. 2.

[20]) C. 24, q. 1, c. 19. Gratianus does not refer only to a heretic already condemned, and so excommunicated and formally casted outside of the Church. On the contrary, such canon refers first of all to not-yet excommunicated heretics, to those '*heretici*' who '*putabant se esse in ecclesia*' (Johannes Teutonicus, Decretum [n. 19], ad C. 24, q. 1, c. 19, fol. 290, ∫ *Alienus*).

[21]) Ruggero Maceratini, Ricerche sullo status giuridico dell'eretico nel diritto romano-cristiano e nel diritto canonico classico (da Graziano ad Uguccione), Padova 1994, p. 229–231.

[22]) Summa Tractaturus Magister, ad C. 24, q. 1, pr. (text in Titus Lenherr, Die Exkommunikations- und Depositionsgewalt der Häretiker bei Gratian und den Dekre-

non ratione sententie uidetur ligatus, set ratione criminis precipitur

The separation from the Church has already occurred with the sin. After all, sin is but separation: '*peccatum privatio quedam est*', states Aquinas[23]). In the case of heresy such *privatio* is magnified, so to say, to the highest degree. Just as the original sin, severing mankind from God, deprived the first man of the original state of grace consisting in the communion with God[24]), so the separation from the Church committed through heresy replicates the same divorce[25]). In so doing, however, the heretic is committing, if possible, a greater sin, for he is rendering vain – for himself – the very sacrifice of Christ[26]):

isti [haeretici] passionem Christi euacuare et distrahere dicuntur simplices de ecclesia perhaeres et schismata peuertendo vacuam et inefficacem eis Christi passionem reddunt

The immediateness of the legal consequences of heresy may be seen in the *Decretum* itself, where Gratianus denies the power to excommunicate to the bishop fallen into a new but not yet condemned heresy[27]):

si autem ex corde suo nouam heresim confinxit, lex quo talia predicare cepit, neminem dampnare potuit, quia non potest deicere quemquam iam prostratus. Ligandi namque vel soluendi potestas veris, non falsis sacerdotibus a Domino tradita est

The ultimate reason for the immediate effects of heresy on the bishop's authority lies in the intimate connection between his *iurisdictio* and his union to the Church. In Gratianus' words[28]):

dimittere peccata vel tenere, excommunicare vel reconciliare opus sit Spiritus sancti et virtus Christi

It follows that[29]):

quicumque ergo ab unitate ecclesiae […] *fuerit alienus, execrare non potest, consecrare non valet; excommunicationis vel reconciliationis potestatem non habet*

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tisten bis zur Glossa ordinaria des Johannes Teutonicus, St. Ottilien 1987, p. 221, note 24); cp. Guido de Baysio, Rosarium (n. 17) ad C. 4, q. 1, c. 2, fol. 173, ∫ *Quod autem*, pr. See further the sharp observations of Josephus Zeliauskas, De Excommunicatione Vitiata apud Glossatores (1140–1350), Zürich 1967, p. 89.

[23]) Aquinas, De Malo, eds. Richard Regan and Brian Davies, Oxford 2001, q. II, p. 121.

[24]) Ibid., q. IV, p. 334.

[25]) Philip Sherrard, Church, Papacy and Schism, A Theological Enquiry, London 1978, p. 78–81.

[26]) Guido de Baysio, Rosarium (n. 17), ad C. 24, q. 1, c. 23, fol. 320, ∫ *Distrahitur*.

[27]) C. 24, q. 1, c. 4.

[28]) Ibid.

[29]) Ibid.

The bishop puts himself *extra ecclesiam* when he '*ex corde suo* […] *confinxit*' such a new heresy – and not when he is condemned for it. As the Holy Spirit does not dwell outside the Church[30]), in the very moment the bishop begins to follow a wrong doctrine his communion with the Church is already severed[31]). Despite being still legally in possession of his *dignitas*, he ought not to exercise the pre-eminent powers stemming from it (*ligare, solvere, reconciliare* and *excommunicare*). Because of its ultimate transcendental nature, Canon law cannot accept a nominal power substantially deprived of its content.

Such an interpretation of the *Decretum* – that heresy produces effects even before the act of excommunication – even if not unanimous[32]) – met with increasing success amongst Decretists[33]) until it was included in the Gloss of Johannes Teutonicus[34]), and eventually it found its staunchest champion in the influential Decretalist Guido de Baysio[35]).

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[30]) Johannes Teutonicus, Decretum (n. 19), ad C. 7, q. 1, c. 16, fol. 174, ∫ *Nihil contra ordinis*; cp. Henricus de Segusia, Lectura (n. 16), vol. I, ad X.1.6.5, fol. 38, ∫ *Quia tua diligentia*.

[31]) Augustine, De verbis domini, Sermo 71, especially n. 19ff., eds. Luc de Coninck/Bertrand Coppieters Wallant/Roland Deleulenaere, La tradition manuscrite du recueil De verbis domini jusq'au XII[e] siècle, Turnhout 2006, p. 202–238.

[32]) As Guido de Baysio reports, the foremost dissent ('*maxime*') came from Vincentius Hispanicus, '*qui scripsit quod non credit Gratiano dicenti, quod ex quo quia incipit praedicare haeresim, ex tunc non potest excommunicare*' (Guido de Baysio, Rosarium [n. 17], ad C. 24, q. 1, c. 35, fol. 321, ∫ *Ait*). See Elisabeth Vodola, Excommunication in the Middle Ages, Berkeley 1986, p. 29–30.

[33]) Lenherr, Exkommunikations- und Depositionsgewalt (n. 22), p. 194–261.

[34]) Johannes Teutonicus, Decretum (n. 19), ad C. 24, q. 1, c. 1, fol. 288, ∫ *Quod autem*: '*queritur an hereticus possit alium deponere suspendere vel excommunicare:* […] *distinguitur: si incidit in damnatam heresim nullum damnare vel excommunicare potest* […] *si novam confingit heresim antequam de ea damnetur suspendere vel excommunicare potest* […] *quod adhuc toleratur ab ecclesia. Tu autem dicas indisctincte: quod sive veterem sive novam sequitur excommunicatus est* […] *Et procedit haec ordine Gra*[*tianus*]. *Primo probat quod hereticus nullum valeat condemnare* […] *innuendo distinctionem suas: deinde probat contra: tandem dat solutionem*. Immediately thereafter (ibid*., s.v.* Qui vero), Teutonicus is more explicit: '*hec distinctio* [between old and new heresies] *hodie locum non habet: quod omnis heresis est damnata, et omnis hereticus est excommunicatus quantumcunque sit occultus: et immo non potest alios excommunicare, unde si sciem per latum teum esse hereticum qui novam fingit nec tunc predicaret: si me excommunicaret celebrarem in occulto sed non in aperto: quod cum non possem probare eum esse hereticum sic me non excommunicatum deponeret.* […] *Sed quid de alia sententia? Item: quod nulla est sententia quam tulit sed tamen tolerabitur postea*'. The concept is further repeated in ad C. 24, q. 1 pr.,

Yet the legal effects of heresy, immediate as they may be, are far from being exhaustive. Until deprived of his *iurisdictio,* the heretical bishop ought not to exercise it, but he cannot be prevented from so doing. If he uses of his powers he commits an abuse, but his acts will be valid the same[36]):

tenet eorum sententia: ipsi tamen peccant iudicando

The case of the bishop already fallen into heresy but not yet condemned for it produces a tension that Canon law may neither structurally accept nor immediately expunge. This tension ultimately derives from the complexity of the concept of *dignitas*. The moral unworthiness of the heretical bishop is already proof enough of his legal unfitness. Unfit as he may be, however, the heretical bishop has to be formally condemned before he can be removed. Until his condemnation, therefore, he will retain a status of which he is both unworthy and substantially unfit. But the legal system requires a formal condemnation before depriving him of a status he does not deserve anymore. The ensuing tension is a conflict between form and substance. As for the substance, heresy has already severed the bishop from the Church. As for the form, however, the bishop has not suffered a sentence of excommunication, nor has his doctrine been condemned as heretical yet. It is not possible, therefore, to prevent him from exercising his powers. As long as the heretical bishop does not exercise his powers, the conflict between form and substance remains latent. The moment he makes use of them, however, the conflict breaks down and the bishop commits a sin – *peccat.* When exercising jurisdictional prerogatives of which he is *indignus* (in both the meanings of unworthiness and unfitness), the *iudex* condemns himself[37]):

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fol. 288, ∫ *Quidam episcopus*, *s.v.* Quidam espiscopus in heresim: '*omnes hereticorum quidam sunt manifesti quidam occulti: et ecclesia excommunicat quinquis hereticos quinquis catholicos.*'

[35]) Guido de Baysio, Rosarium (n. 17), ad C. 24, q. 1, c. 4, fol. 318, ∫ *Audiuimus curare*, n. 1: '*Dicas quod sententia excommunicationis ab excommunicato quantuncunque occulto prolata: est nulla, dummodo postea detegatur. Et ratio, quia cum sit extra comunionem ecclesiae non potest habere hanc potestatem*'; cp. Id., In Sextum Decretalium Commentaria, Venetiis 1577, ad VI.5.11, fol. 124–125, ∫ *De sententia excommunicationis,* n. 1, 2 and 11.

[36]) Johannes Teutonicus, Decretum (n. 19), ad C. 3 q. 7, pr., fol. 157, ∫ *Quod iudex*, *s.v.* Quod iudex; cp. ibid., ad C. 3 q. 7, c. 7, fol. 158, ∫ *Sacerdos*, *s.v.* In evangelio: '*Gratianus criminosum iudicem non posse iudicare sed repellendum esse ad instar salis infatuati. Postea obiicit ostendendo quod iudices licet sint criminosi tamen iudicare possunt. ad ultimum dat solutionem dicens quod iudicare possunt ex officio eis concesso: et sententie late ab eis valent donec ab ecclesia tollerantur.*'

[37]) Ibid., ad C. 3, q. 7, c. 7, fol. 158, ∫ *Sacerdos*, *s.v.* In evangelio.

criminosus alterius criminis iudex esse non potest, et se ipsum condempnat, dum in alterius crimen sententiam profert

The (moral) condemnation of the *criminosus iudex* betrays the unlawfulness of his conduct, but does not prevent his decision from standing. Until the formal (that is, judicial) deprivation of his status, the conflict between form and substance will be tangible each time the heretic bishop will exercise those powers he ought not to possess any longer. The sin he commits in exercising them betrays the substantial unlawfulness of his *iurisdictio*. The wound between form and substance is inflicted in the moment the bishop becomes heretical and, so to speak, keeps on bleeding until he is formally condemned and divested of his powers. Ultimately, therefore, the purpose of his condemnation is to mend such a wound, to restore coherence and unity in a legal system as ethically oriented as Canon law.

III. The nisi a fide devius clause

The deeper a wound, the more urgent the care it requires. It is not surprising that the first answer to this tension between form and substance was provided right where the tension reached its apex – in the case of the heretical pope. In granting complete judicial immunity to the pope, the *Decretum* provided a single exception[38]):

[Papa] a nemine est iudicandus, nisi deprehendatur a fide devius

Just like the heretical bishop (in fact, like any Christian whosoever), the communion with the universal church is severed in the moment the pope places himself outside of it[39]). *Deviare a fide* deprives him of his *iurisdictio* so that, becoming *minor* than any Christian, he may be judged by any Christian[40]). The problem lies in the fact that, as long as the pope is not found heretic, he remains *maior* and, as such, he cannot be judged by anyone (for, as we have seen before, *iurisdictio* is exercised by the *maior* on the *minor*). To get around this logical impasse, Canon lawyers followed two different routes. Some held that the *universalis ecclesia* – represented by the ecumenical council or by the *collegium* of the cardinals – is above the pope, and so it is able to judge him. Others argued that the moment the pope separates himself from the Church he ceases *ipso facto* to be the Vicar of Christ. We are particularly interested in this second route. In order to examine it, two *summae* shall be

[38]) D. 40, c. 6.

[39]) Victor Martin, Comment s'est formée la Doctrine de la Supériorité du Concile sur le Pape, in: Revue des sciences religieuses 17 (1937), p. 121–143.

[40]) C. 6, q. 1, c. 20.

briefly mentioned: the first because of its special attention to the effects of heresy to the belonging to the Church, the second for its crucial importance[41]).

In the *Summa Et est sciendum*, the author wonders why heresy is so different from any other sin[42]):

set quare est in heresi speciale? Quia cetera peccata unitatem ecclesie non rumpunt. Cum ceteris enim uiciis potest esse homo membrum ecclesie licet putridum. Heresis uero uel scisma ipsam uiolant unitatem et fundamentum fidei maculant et corrumpunt, unde cum sit hereticus est quolibet catholico minor

Heresy separates the heretical pope from the *unitas ecclesiae*. In the moment the pope is no longer in communion with the Church, he places himself outside of it. Hence the juxtaposition between heresy and schism ('*heresis uero uel scisma*'), for they produce the same effect. They tarnish and corrupt the unity and the very ground of the faith ('*unitatem et fundamentum fidei maculant et corrumpunt*'). What is particularly interesting is the author's use of the verb '*corrumpunt*' instead of '*rumpunt*'. The reason is not only stylistic (since '*rumpunt*' had just been used a *variatio* was appropriate). '*Corrumpunt*' describes the very process leading from heresy to schism. '*Corrumpere*' is the development of '*maculare*'. Unlike other *vitia* ('*ceteris enim uiciis*') tainting the man's soul but leaving him in communion with the Church ('*membrum ecclesie licet putridum*'), heresy and schism tarnish the sinner but also '*violant*' the unity of the Church. The sin of heresy '*maculat*' the sinner, '*corrumpet*' his communion with the Church, and ultimately '*violat*' the very unity of the Church itself. The moment the pope places himself outside its unity and communion because of heresy or schism, he deprives himself of his *maiestas*/*dignitas* and, consequently, of his *iurisdictio*. He is *quolibet catholico minor* and, as such, he can be judged by any Christian[43]).

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[41]) Among several *summae* dealing with the heretical pope see in particular: Summa Reverentia sacrorum canonum, ad D. 21 c. 3 and D. 40, c. 6 (Erfurt, Stadtbücherei, ms Amplon quart 117, fol. 119va and 125ra, ∫ *A fide*); Huguccio, Summa Decreti, ad D. 40, c. 6 (Admont, Stiftsbibliothek, ms 7, fol. 57rb–57va); Summa Prima primi uxor ad e, ad D. 40, c. 6 (London, British Library, ms Royal 11, fol. 322ra); Summa Ecce uicit leo, ad D. 21, c. 4, and D. 40, c. 6 (Sankt Florian, Stiftsbibliothek, ms XI, 605, fol. 8vb, and fol. 17rb, 17va respectively). The references follow the transcription of James M. Moynihan, Papal Immunity and Liability in the Writings of the Medieval Canonists, Roma 1961, p. 68–9, 80, 84–5 and 90–91 respectively.

[42]) Summa Et est sciendum, ad D. 40, c. 6 (Barcelona, Archivo de la Corona de Aragon, ms S. Cugat 55, fol. 79*v*; transcription of Moynihan, Papal Immunity [n. 41], p. 64, note 69).

[43]) Cp. Summa Omnis qui iuste, ad D. 40, c. 6 (Rouen, Bibliothèque municipale, ms 743, fol. 18vb; transcription of Brian Tierney, Pope and Council, some new

The starting point of the *Summa Duacensis* is that '*simul* […] *et papa et hereticus esse non potest*'. Once fallen into a heresy, logic compels to consider the pope *ipso facto* deprived of his *dignitas*. The author subtly argues that, although the '*nisi devius*' clause may seem an exception, it is more correctly the consequence of the general principle[44]). In applying this principle, the author does not make any distinction between an already condemned heresy and a new one. What is relevant for the author of this *Summa* is whether the pope is still adhering to the doctrine of the Church or not. If the pope does not want to abandon his doctrine, he ceases *ipso facto* to be pope. It is worthwhile to underline the *ipso facto* argument. It is the very heretical act that severs the ties between the individual and the institutional framework of the universal Church. If heresy necessarily entails the divorce from the communion of the Church, it would be a contradiction in terms to be Christian and non-Christian at the same time. It is, therefore, a logical consequence (or, from a theological perspective, almost an ontological necessity) that the heretic ceases to be pope because of the *fact* of his heresy and not because of a provision found in the *Decretum* or elsewhere.

Probably influenced by the abovementioned *Summae*, Johannes Teutonicus states[45]):

si papa hereticus est in eo quod hereticus est, est minor quolibet catholico […] *quod lex factum notat etiam sine sententia*

'In that he is heretic' ('*in eo quod hereticus est*'), cryptic as it may look, is what triggers the deposition of the pope. It is the legal fact that annihilates the pope's *dignitas* and consequently deprives him of any *iurisdictio*. Because of the fact of his heresy, and in the very moment it occurs, the pope is *ipso facto* divested of his *dignitas*, and so of his *iurisdictio*. The last words of Teutonicus' statement ('*etiam sine sententia*') are themselves the outcome of a long debate that possibly culminated, just a few years before his Gloss, with Innocentius III. '*Si videlicet evanescat in haeresim*', stated Innocentius, the pope '*potest ab hominibus iudicari, vel potius iudicatus ostendi*'[46]). The reason for

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decretist texts, in Id., Church Law and Constitutional Thought in the Middle Ages, London 1979, p. 197–218, at p. 216).

[44]) Summa Duacensis, ad D. 40, c. 6, fol. 99rab (Douai, Bibliothèque municipale, ms 649, fol. 96vb; transcription of Moynihan, Papal Immunity [n. 41], p. 87, note 113); cp. Summa De Iure Canonico Tractaturus (Rudolf Weigand, Peter Landau and Waltraud Kozur [eds.], Città del Vaticano 2004), ad D. 40, c. 6, p. 130.

[45]) Johannes Teutonicus, Decretum (n. 19), ad C. 24, q. 1, c. 1, fol. 288, ∫ *Achatius*, *s.v.* In heresim.

[46]) Innocentius III, Sermo secundo in consecratione Pontificis Maximis, in Id., Opera, Coloniae 1575, p. 188; see also his Sermo III, ibid., p. 194.

which a *sententia* is not indispensable lies in its declaratory nature. The pope can be judged because he has already lost his *maioritas* (or, in absolute terms, *dignitas*). The function of such a judgment is not to make the pope heretical, but rather *ostendere eum* as (*iam*) *iudicatum*. The judgment condemning the heretical pope is not constitutive but declaratory, just as in the case of the heretical bishop. As Johannes Andreae argues, '*licet occultus*', the heretic is already '*a deo separatum propter peccatum*'. Indeed, '*proprie non excommunicatio sed peccatum separat a deo*'[47]).

The *nisi a fide devius* clause resolves the tension between form and substance right where it becomes unbearable. Heresy operates *ipso facto* but must be ascertained *ope sententiae*. In the case of the pope, the tension is insoluble: who can judge the supreme judge? It is the uniqueness of the 'crisis' that compels its interpreters to resort, so to speak, to the last weapon at their disposal: the legal death of the heretical pope. Before the advent of conciliarist doctrines, Canon lawyers had to argue that the heretical pope does not exist: '*sive hereticus sive papa*'. Unlike the case of the heretical bishop, the 'legal aberration' of the vicar of God that denies God, the head of the Church who is not in communion with the Church itself, could not be tolerated even temporarily. In the moment he becomes *devius* ('*in eo quod hereticus est*') the pope severs his belonging to the Church so that, for the law of that same Church, he does not exist anymore.

IV. The schism in Canon law

The solution envisaged to solve the problem of the heretical pope was based on the *ipso facto* applicability of legal death: the very fact of his heresy was sufficient to 'delete' him from the legal framework of the Church, to render him non-existing for it – *sive papa sive hereticus*. Ingenious as it was in its abstractness, such a solution was hardly applicable in practice. To render legal death a viable route, the fracture between the *indignus* and the values embodied in the legal system, between form and substance, had to be complete. As long as form remained divorced from substance it conferred a show of legality sufficient to preserve – albeit precariously – the *iurisdictio* of the *indignus*. This is why Canon lawyers progressively opted for schism as a concept contiguous but not identical to heresy.

The continuity between heresy and schism lies in the meaning of heresy. In the Canon law discourse, heresy is not only a mistake in an article of faith.

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[47]) Johannes Andreae, Novellae super I-V Decretalium, Venetiis 1504–1505, vol. II, ad X.5.6.6, fol. 25, ∫ *Ita quorundam*.

Obviously, heretic is first of all that who '*erravit in expositione sacrae scripturae*'[48]). Yet such *errare*, as its own meaning reveals, is walking the wrong way in one's own thought as well as in one's own path. Such a two-fold perspective of heresy – making a mistake and going astray – is particularly highlighted by Johannes Andreae[49]):

heresis et dicitur heresis ab electione erroris vt ibi uel ab erro erras […] *uel ab hereco uel herecisco quod est diuido*

Divisio is both a physical and an ethical condition. The *Decretum* masterly captures such duality when it defines heretic '*qui ab integritate catholicae fidei recedit*'[50]). *Recedere ab integritate* couples the (physical) act of deviating with the (ethical) departure from the truth. It is very important that the *aberratio fidei* is described as *deviatio ab integritate* – and not merely *ab veritate*. Just as *integritas* is *veritas* in the ethical discourse, in the legal one *veritas* is *integritas*[51]):

homo, qui preciditur de Christi iusti corpore, nullo modo potest tenere spiritum iusticiae

Because of the conceptual closeness between *veritas* and *integritas*[52]), a short distance separates heresy from schism[53]):

Thratius [*Tercius*] *et Maximilianus heretici erant et episcopi: qui unitatem ecclesie conturbantes res ecclesie suis usibus applicabant*

The heresy of the two bishops lies in their 'perturbing' the *unitas ecclesiae*. It is interesting to note that the object of the verb '*conturbantes*' is not the purity of the faith, but the unity of the Church. The subtle ambiguity of this excerpt is that a physical entity like the unity of the Church is not the obvious object of the state verb '*conturbare*'. It is the same ambiguity of the phrase '*recedere ab integritate catholicae fidei*', where an action verb was used in lieu of a state verb. As Johannes Teutonicus explains[54]):

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[48]) C. 24, q. 3, c. 27.

[49]) Johannes Andreae, Novellae (n. 47), vol. II, ad X.5.7.3, fol. 28, ∫ *Firmissime*; cp. C. 24, q. 1, c. 24 ; Henricus de Segusia, Lectura (n. 16), vol. I, ad X.1.6.5, fol. 37, ∫ *Quia tua diligentia*; Guido de Baysio, Rosarium (n. 17), ad C. 24, q. 3, c. 27, fol. 324, ∫ *Haeresis*, n. 1.

[50]) C. 24, q. 1, c. 4.

[51]) C. 23, q. 7, c. 4.

[52]) Guido de Baysio, Rosarium (n. 17), ad C. 24, q. 1, c. 23, fol. 320, ∫ ad *uocauit.*

[53]) Johannes Teutonicus, Decretum (n. 19), ad C. 23, q. 5, c. 44, fol. 282, ∫ *Quali nos*.

[54]) Ibid. (n. 19), ad C. 24, q. 1, c. 21, fol. 290, ∫ *Non afferamus*, *s.v.* Sceleratius, and ad C. 24, q. 3, c. 25, fol. 294, ∫ *Inter heresim et schisma* respectively; cp. Aquinas,

omne schisma habet heresim annexam: maxime exquo perseverat: unde non est differentia nisi quo ad principium […] *et ideo in principio discordant sed in fine concordant: quia sicut heresis ita schisma ecclesiam ledit*

Errare, in other words, is not just the result of a *deviatio,* but of a *divisio*[55]). The *deviatio a veritate* is already *divisio ab ecclesia*. As such, only a short distance separates heresy from schism, for any heresy ultimately leads to the divorce from the Church[56]):

stricte sumitur hereticus omnis qui remotus est ab ecclesia

The distinction between heresy and schism is laid out in Teutonicus' Gloss[57]):

potest dici quod hec sit differentia inter heresim et schisma que est inter dispositionem et habitum. primo enim dicitur schisma sed cum post tempus pertinaciter adheserit sue secte dicitur heresis. Vel aliter dicas quod omnis hereticus sit schismaticus: sed non convertitur. et sic est illa differentia que inter speciem et genus

While heresy requires *dispositio*, a mental element, schism is just *habitus*, a form of observed conduct. *Hereticus* is that who errs, who deviates from the faith of the Church. Such a deviation may occur directly from the Church (in which case the *devians* is *scismaticus*), or it may originate in a diversion from its faith (and so the *errans* is *hereticus*). Heresy and schism, says Teutonicus, are '*gradus*': different intensities, different degrees of a same thing – the separation from the Church[58]). In the case of heresy, this deviation occurs in the private of one's own conscience. In the case of schism, on the contrary, the deviation takes place outside of the sinner's soul, and therefore it is immediately visible. When heresy is still just within one's own soul it lacks of *habitus*, it is *occulta,* it 'lurks in the shadows in the vineyard of the Lord'[59]).

Summa Theologiae, (Pietro Caramello [ed.], Taurini 1962), vol. II, 2a 2ae, q. 39, a. 1, p. 203–204.

[55]) Johannes Teutonicus, Decretum (n. 19), ad C. 24, q. 3, c. 25, fol. 296, ∫ *Illi qui, s.v.* Heresim. See also Henricus de Segusia, Lectura (n. 16), vol. I, ad X.1.6.5, fol. 37–38, ∫ *Quia tua diligentia*, and Johannes Andreae, Novellae (n. 47), vol. II, ad X.5.7.3, fol. 28, ∫ *Firmissime*.

[56]) Johannes Teutonicus, Decretum (n. 19), ad C. 24, q. 3, c. 25, fol. 296, ∫ *Illi qui*, *s.v*. Heresim.

[57]) Ibid., ad C. 24, q. 3, c. 25, fol. 297, ∫ *Inter heresim et schisma*, *s.v.* Et schisma.

[58]) Ibid., ad C. 24, q. 3, c. 25, fol. 296, ∫ *Illi qui*, *s.v.* Heresim; cp. Ibid., ad C. 24, q. 2, c. 3, fol. 294, ∫ *Sane*.

[59]) Simonis de Bisignano, ad C. 24, q. 1, c. 35, ∫ *ex quo talia predicare*: '*quoniam quanto heresis serpit occultius tanto grauius dominicam uineam in simplicibus demolitur*' (text in Josef Juncker, Die Summa des Simon von Bisignano und seine Glossen, in: ZRG 59 Kan. Abt. 15 (1926), p. 326–501, at p. 377; now in: Peter V. Aimone [ed.], Summa Simonis Bisinianensis, pars I, 2007, p. 388, availa-

On a substantial level any heresy, occult as it may be, is already separation from the Church[60]). However, as long as the heretic's *deviatio* lies just *in dispositione*, he may not be condemned, for '*ecclesia non iudicat de occultiis*'[61]). It is therefore crucial that heresy becomes manifest. What makes apparent the heretic*'s* inner *dispositio* is his perseverance (*contumacia*) in heresy[62]). *Contumacia* proves the heretic's *deviatio* from the Church *in habitu*, rendering his heresy notorious and his status of *separatus ab ecclesia* apparent[63]):

unde ad rationem haeretici, due concurrunt. vnum est error in ratione, quod est haeresis initium. alterum pertinacia in voluntate, quod est haeresis complementum

Heresy may be legally condemned only when manifest and notorious[64]). Schism, on the contrary, being manifest from its inception, betrays immediately the separation of the *devius*, his non-belonging to the Church[65]). Schism lacks of the tension between the interior parting from the common faith and the exterior apparent belonging to the Church that we encounter in heresy. It is divested of that fracture between form and substance that renders heresy so tantalising. Indeed, schism lies right in the exterior and visible departing from the Church[66]):

scissio autem unitati opponitur. Unde peccatum schismatis dicitur quod directe et per se opponitur unitati

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ble online, URL: < http://www.unifr.ch/cdc/summa_simonis_2baende/summa_simonis_BAND_I.14.10.2007.pdf>).

[60]) Sicardus Cremonensis, Summa Decreti, ad C. 24, q. 1: '*si* [*hereticus*] *nouam* [*heresim*] *fingit, se ab ecclesie separat unitate. Qui autem non est in unitate alium soluere uel ligare non ualet*' (text in Lenherr, Exkommunikations- und Depositionsgewalt [n. 22], p. 287).

[61]) Henricus de Segusia, Lectura (n. 16), vol. I, ad X.1.33.7, fol. 179, ∫ *Per tuas, s.v.* ad quod breuiter respondem.

[62]) Johannes Teutonicus, Decretum (n. 19), ad D. 40, c. 6, fol. 41, ∫ *Si papa, s.v.* A nemine: '*Contumacia dicitur haeresis*'. *Contumacia* implies intentionality: ibid., ad C. 24, q. 1, c. 21, ∫ *Non afferamus*, *s.v.* Non afferamus: '*magis tamen peccaverunt schismatici quam illi heretici qui idolum adoraverunt: cum illi* […] *non peccaverant ex aliqua imbecillitate vel consuetudine, sed tamen ex contumacia vel scienter*.' Cp. Guido de Baysio, Rosarium (n. 17), ad C. 4, q. 1, c. 1, fol. 173, ∫ *Diffinimus*; Bernardus Parmensis, Decretalium compilatio (n. 10), ad X.2.1.10, fol. 114, ∫ *Cum non ab homine*; Gundisalvus de Villadiego, Tractatus conta haereticam prauitatem, Salmanticae 1589, q. I, p. 3.

[63]) Guido de Baysio, Rosarium (n. 17), ad C. 24, q. 3, c. 27, fol. 324, ∫ *Haeresis*, n. 1.

[64]) Der erste Fortsetzer des Huguccio, ad C. 24, pr. (transcription of Lehnherr, Exkommunikations- und Depositionsgewalt [n. 22], p. 228, note 56).

[65]) Alvarus Pelagius, De planctu Ecclesiae (n. 12), I.65, fol. 81 and 2.72, fol. 192.

[66]) Aquinas, Summa Theologiae (n. 54), vol. II, 2a 2ae, q. 39, a. 1, p. 203.

It is not the Church, therefore, that has to (re)act against such a manifest *deviatio* and condemn the *devians*. It is the *devius* that renders himself *extraneus* to it. Schismatics, indeed, '*hi sunt qui segregant seipsos*'[67]). While the burden to identify and expel the heretic lies on the Church, in the case of schism such a task is, so to speak, performed by the schismatic himself. His deviation from the Church is external (and so tangible), and does not need any further distinction. It is immaterial whether the schismatic has the intention to withdraw from the Church: as long as the *habitus* attests a *deviatio ab ecclesia,* his *dispositio* is irrelevant. Schismatics, in fact, '*segregant seipsos, animam vel seipsam non habentes*'[68]). It is interesting to note that nearly any time Canon lawyers refer to schism, the verb they employ to describe the departing from the Church of the schismatic is in the active form. The schismatic *segregat* / *separat* / *dividit* himself from the Church, he is not *segregatur* / *separatur* / *dividitur* from it. His visible dissociation from the Church betrays a condition of complete extraneousness from it that does not require any further action by the Church[69]).

Whereas in heresy it is the Church that casts the *devians* out of itself, in the case of schism the *separatio* occurs immediately because of the deeds of the *devians*, of his *habitus*. While it is possible to envisage a moment in which the heretic is still formally (*in habitu*) within the Church but substantially (*in dispositione*) outside of it, the same is not possible for schism. Schism, in other words, operates *ipso iure* from the very moment of its inception[70]). In the moment one becomes schismatic, he is already outside the *communio ecclesiae* and separated from the Church, so that he cannot enjoy any *potestas* in the Church[71]). In the words of Innocentius IV[72]):

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[67]) Johannes Teutonicus, Decretum (n. 19), ad C. 24, q. 1, c. 34, fol. 292, ∫ *Schisma*; cp. Henricus de Segusia, Lectura (n. 16), vol. II, ad X.5.8.1, fol. 282, ∫ *Si dicientes*.

[68]) Johannes Teutonicus, Decretum (n. 19), ad C. 24, q. 1, c. 34, fol. 292, ∫ *Schisma*; cp. Aquinas, Summa Theologiae (n. 54), vol. II, 2a 2ae, q. 39, a. 1, p. 203, and Augustinus Triumphus, Summa de potestate ecclesiastica Romae 1584 (available online, URL: < http://books.google.ch/books?id=NbVKAAAAcAAJ&printsec=frontcover&hl=de&source=gbs_ViewAPI&redir_esc=y#v=onepage&q&f=false>), pt. 1, q. 26, art. 1, p. 155.

[69]) C. 24, q. 3, c. 8; cp. Augustine, de verbis Domini, sermo 12 (Jacques-Paul Migne [ed.], Patrologia Latina, vol. 38, 1850), col. 99–106.

[70]) Guido de Baysio, Rosarium (n. 17), ad C. 4, q. 1, c. 1, fol. 173, ∫ *Diffinimus*.

[71]) Johannes Teutonicus, Decretum (n. 19), ad C. 24, q. 1, c. 31, fol. 292, ∫ *Dicimus*, *s.v.* Didicimus.

[72]) Innocentius IV, In Quinque Libros Decretalium, Augustae Taurinorum 1581,

schismatici […] *excommunicati sunt ipso iure*

The importance of the distinction between *dispositio* and *habitus* is well attested. Seeking to put an end to the dispute with the Franciscans on the right of the Church to own substances, Pope John XXII issued the Constitutions *Ad conditorem* and *Cum inter nonnullos* (1322 and 1323 respectively). The Emperor Ludwig of Bavary seized the opportunity to accuse him of notorious heresy as *a fide devius deprehensus*, so to proclaim his deposition at Pisa on the 13th December 1328[73]). It was right at the moment of the publication of the two Constitutions, held the Emperor, that the '*nisi a fide devius*' clause was *ipso facto* triggered. Ludwig agreed that no Christian could judge the pope's *dispositio*, but insisted that any faithful could (and ought to) notice his heretical *habitus*. In other words, according to Ludwig of Bavary, John XXII's fallacious belief became justiciable heresy in the very moment he rendered it manifest, because in that moment the (internal) *dispositio* became (external) *habitus*[74]).

Just a couple of decades earlier, another pope had to face a similar but thornier issue. At the eve of the fourteenth century, the detractors of one of the most controversial popes of the late Middle Ages, Boniface VIII, found an excellent ground for contesting the validity of his election in the unprecedented abdication of his predecessor, Celestine V. Of the two most famous pamphlets against Boniface, one was the accusation of heresy by the French King Philip the Fair in 1303, the other was the accusation of schism by the Colonna cardinals, Jacopus and his nephew Petrus, six years earlier, in 1297. In that year, the Colonnas issued three manifestos against Boniface. The third was the harshest and, at the same time, the most legally-minded one. As much as their opponent, the Colonnas were consummate Canon lawyers and instead of attacking the Pope as heretic, they opted for schism. Boniface, held the Colonna cardinals, was schismatic because he had separated himself from the true Pope, and so from the true Church. At the same time they masterfully sug-

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ad X.5.8.1, fol. 209, ∫ *Qvod a paedecessore*, n. 2; cp. Johannes Teutonicus (n. 19) ad C. 9, q. 1, fol. 182, ∫ *Nos*, *s.v.* Ab excomunicatis.

[73]) Stephanus Baluzius, Vitae Paparum Avenionensum, ed. Guillaume Mollat, 1921, vol. III, p. 433–450.

[74]) Ibid., p. 446: '*Quamobrem ex quo incepit dicta haereticalia statuta concedere et publice divulgare et pertinaciter defensare, in haeresim est prolapsus et fuit omni ecclesiastica dignitate, auctoritate et potestate ipso facto privatus, nec est necesse quod accusetur vel dampnetur per aliquem. Nam sicut legitur in decretis XXIIII cap* [C. 24 q. 1, c. 31], *Dicimus omnes haereticos nihil habere potestatis ac iuris, et, Quicunque in haeresim dampnatam labitur, in ipsa dampnatione se ipsum involvit*'.

gested that his schismatic conduct verged on heresy – another *topos* amongst Canon lawyers[75]). This way, the Colonnas were entrenching their arguments on sound ground. The very fact that the previous Pope was still alive while the new one was elected proved the invalidity of Boniface's election. The very presence of a second and false pope necessarily led to a bicephalous church, and so to schism. Being schismatic, the Colonna held, the pope was *ipso iure* divested of any *dignitas* and expelled from the Church.

V. Legal death and vacatio sedis

The solution to the problem of the heretical pope was an application – although one of the first in time and surely the foremost in importance – of the concept of legal death in Canon law. During the thirteenth century Canon lawyers progressively shifted their attention from the heretical pope to the bishop *in haeresi deprehensus*. Because of the contiguity of the two *crimina* it was not difficult, as we have just seen, to move from heresy to schism. And yet the advantages of schism were evident. Albeit heretical, and so substantially outside of the Church, the bishop would formally retain his status (and so his *maiestas/maioritas*) until formally condemned. Schism, on the contrary, operated *ipso iure*. Applying to the *devius* bishop the same rational as the *devius* pope, Canon lawyers ultimately achieved the same result: the *ipso iure* deposition through legal death. With the *fictio iuris* of the bishop's legal death, Canon lawyers were able to consider the episcopal chair to be vacant.

The bishop was the head of the *capitulum*. As such, Canon lawyers could not accept a prolonged situation in which he was unable to preside over and legally represent it. Probably one of the first instances in which measures were taken for such a problem was the case of insanity. By the mid-1170s it was already a well-established principle that an insane bishop – though not merely an old one – should be replaced as soon as possible[76]).

In Teutonicus' Gloss there may be found the seeds of the future developments of the concept of legal death. Just as the Civilians were doing on their part[77]), he worked out the analogy between legal and physical death moving

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[75]) Distinctiones 'Si mulier e ad em hora' or 'Monacenses', ed. Rosalba Sorice, Città del Vaticano 2002, ad D. 40, c. 6, ∫ *Si papa,* p. 37.

[76]) Linda Fowler-Magerl, Innocent Uselessness in Civilian and Canonist Thought, in: ZRG 89 Kan. Abt. 58 (1972), 107–165, at p. 117.

[77]) Accursius, Glossa in Codicem, in Pandectarum Iuris Civilis, Parisiis 1566, vol. IV, ad Cod. 1.2, in *Authenticam De Sanctissimis Episcopis,* col. 31, ∫ *Si qua mulier*, *s.v.* Competere.

from the admission into a monastic order. The monk, in fact, is 'dead to the world' ('*monachus mortus reputatur mundo*')[78]). As the figure of the hermit, '*quasi divisus ab aliis*', was used to explain the separation of the heretic from the Church[79]), so the figure of the monk was the perfect gateway for applying the legal consequences of death to cases not involving physical demise ('*mors civilis*')[80]). The first extension was the case of the deposition of the bishop, to which Teutonicus applied the same effects as physical death[81]). Teutonicus did not go as far as considering the bishop dead when fallen into a schism, yet in his Gloss there are two passages suggesting that the loss of the bishop's *dignitas* may occur without a legal pronouncement. The first passage is a comment on the expulsion of a bishop from his bishopric occurred without a legal decision. Interestingly enough, the question was not whether it was possible to expel a bishop without a legal pronouncement, but whether the crimes of the bishop were serious enough to justify such an expulsion ('*deiectionem dignum*')[82]). The second passage hinted at some *crimina* that might justify the loss of a bishopric *ipso iure* and not *ope sententiae*. The *casus belli* was the dissipation of the ecclesiastical goods by a bishop who did not want to appoint an *oeconomus* – who would have checked his conduct – so contravening a compulsory Canon law rule. With his conduct, the bishop '*sacerdotali dignitati obtrectatio generavit*', so that '*episcopo infamia generetur*': the *obtrectatio* of his *dignitas* entails *infamia*[83]).

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[78]) Johannes Andreae, Apparatus ad Librum Sextum, Taurini 1620, ad VI.1.3.6, col. 27, ∫ *Non morte*.

[79]) Azo, Summa Codicis (n. 9), ad Cod. 1.5, col. 17, n. 1.

[80]) Johannes Teutonicus, Decretum (n. 19), ad C. 16, q. 1, c. 8, fol. 228, ∫ *Placuit*, *s.v.* Mortuus: '*ingressus religionis equiparatur morti naturali: vnde quod iuris est circa dotem vel donationem propter nuptias in morte naturali idem est in hac morte: id est in ingressum religionis* […] *et sicut donatio causa mortis confirmatur morte naturali: similiter confirmatur morte ciuili.*'

[81]) Ibid., ad C. 12, q. 2, c. 45, fol. 209, ∫ *Charitatem*. The importance of C. 12, q. 2 is clearly attested in Henricus de Segusia, Lectura (n. 16), vol. II, fol. 46–47, *Ne sede vacante aliquid innovetur*, who considered it to be the *sedes materiae* of the *vacatio sedis episcopalis* before the composition of the Liber Extra.

[82]) Johannes Teutonicus, Decretum (n. 19), ad C. 3, q. 6, c. 10, fol. 156, ∫ *Hec quippe*, *s.v.* Suffraganei: '*de hoc solum an episcopi essent iuste deiecti. id est an crimen ab ipsis commissum est deiectionem dignum.*' It should be noted the adjective '*dignum*', which brings us back to the 'functional' meaning of *dignitas*.

[83]) Ibid., ad D. 89, c. 4, fol. 91, ∫ *Quia in quibusdam*. It is worth mentioning that, by the time Teutonicus wrote his Gloss, such *dissipatio* had already been considered akin to heresy in the well-known *Summa* of Stephanus Tornacensis, ad C. 3, q. 1, c. 6, ed. Johann F. von Schulte, Gießen 1891, p. 189

The most important developments, however, took place with the *Compilationes Antiquae* and the *Liber Sextus,* through an increasingly wider reasoning *per analogiam*. Until the *Decretum,* as we have just seen, the only case of *vacatio sedis* contiguous to the death of the bishop was his deposition. The deposition of a bishop, it should be noted, connects an ethical cause with a legal consequence. The bishop should be deposed if notoriously *criminosus* and, once deposed, he would lose any *iurisdictio* over the bishopric. It may not appear irrational to imagine that initially the analogical reasoning of Canon lawyers focused on the 'external' side of the deposition – its legal consequences. So, they held that the *sedis* would be *vacans* in situations akin to *depositio*: the spontaneous *renunciatio* of the bishop and his *translatio* onto a different bishopric[84]). At the same time, however, deposition was the legal consequence of an ethical cause. As such, the reason for being deposed was the *criminen* the bishop had committed. The 'inner' side of the deposition lay in the *criminosus* status of the bishop, a status calling for the deprivation of his *dignitas*. Hence, as observed Johannes Andreae when recalling the Gloss of Teutonicus on the *dissipatio* of the ecclesiastical goods, the legal death of the bishop occurs not only in cases formally akin (that is, 'externally' similar) to the *depositio*, but also when the ethical reason leading to the deposition is substantially ('internally') the same: '*pone, quod peccavit*'[85]). Obviously, the *peccatum* calling for the deposition of the sinner has to be an extremely serious one. Johannes Andreae was in fact referring to those *crimina* leading to the excommunication of a prelate. Yet, as we have seen, any *crimen* requiring the expulsion of the *reus* from the Church – and so, if the case be, the loss of any *dignitas* he enjoyed therein – needed a formal pronouncement. Such is the case of an *indignus* elected as abbot, where the election is void because of

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[84]) Johannes Andreae, ad librum Sextum (n. 78), ad VI.1.8.3, col. 206, ∫ *Mortem*: '*Renunciationem, translationem, depositionem, vel alio modo*'; cp. ibid., ad VI.3.8, col. 516, ∫ *Mortuo*. The objections to such analogical extension were acknowledged but overruled: '*nota ergo quod aliud est cedere, aliud est decedere* […] *Sed nonne renuncians, quo ad Ecclesiam habetur pro mortuo?* […] *sicut et vir ab vxore iudicio Ecclesiae separatus, quantum ad ipsam pro mortuo reputatur* […] *sicut et monachus mortus reputatur mundo* […] *dicit lex, quod per fictionem iuris veritas non confunditur, nec deletur* […] *licet igitur renuncians quo ad ipsam Ecclesiam fingatur mortuus: tamen mortuus non est: nec idem est per omnia in eo, quod in mortuo. Nam talis de nouo posset ad Ecclesiam reassumi* […] *quod in mortuo esse non posset'* (ibid., ad VI.1.3.6, col. 27, ∫ *Non morte*); cp. Johannes Monachus, in Sextum Librum Decretalium dilucida Commentaria, Venetiis 1585, ad VI.1.11, fol. 120, ∫ *Si episcopus*.

[85]) Johannes Andreae, ad librum Sextum (n. 78), ad VI.1.8.3, col. 206, ∫ *Suspenso.*

the inability of the elected to retain that *dignitas*. So the abbey remains *vacans* even after the election[86]), because the election of an *indignus* is void[87]). In its 'functional' meaning of unfitness, *indignitas* is at the same time the incapacity to acquire a *dignitas* and the inability to retain it. It follows that, for the same reason for which the monk was not able to acquire the *dignitas* of abbot, he would not have been able to retain it, had he become *indignus* after the election. In other words, the same legal reason requiring the *sedis* to remain *vacans* despite the election of an *indignus* militates in favour of its vacancy when its legitimate holder becomes *indignus*.

For the law of the Church, the foremost cases of *indignitas* were, quite obviously, those in which one abjured the Church itself: heresy and schism. It was not doubted that those bishops '*in haeresim iam damnatam et indubitatam incidentes*' were legally dead[88]), so that anyone '*a tali obedientia propria auctoritate recedi potest*'[89]). This, however, was not an exception but a confirmation of the need of a judicial decision to condemn the heretic, for the heresy in which those bishops fell had already been condemned.

In legal terms, the *mors* of the excommunication lies in that it alters the legal status of the excommunicated. As Guido de Baysio puts it[90]):

excommunicatio subvertit statum aicuius

The excommunicated, continues the same Baysio, dies in his soul long before he dies in his body[91]):

mors venit […] *a morte, qui est effector mortium excommunicatio, est aeterna mortis damnatio* […] *nam excommunicati longo tempore morte praeueniuntur popter peccatum excommunicationis*

The *subversio* of the excommunicated's status, therefore, results in the total annihilation of his legal capacity. Excommunication, for the theologian,

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[86]) Bernardus Parmensis, Decretalium compilatio (n. 10), ad X.1.33.14, fol. 94, ∫ *Cum olim*: '*Vacante monasterio* […] *monachi elegerunt quendam in abbatem personam videlicet indignam: et sic ipso iure fuerunt eligendi potestate prouati* […] *et cum ecclesia* […] *vacet*.'

[87]) Innocentius IV, In Quinque Libros Decretalium (n. 72), ad X.5.31.9, fol. 216, ∫ *Inter dilectos filios*, n. 2.

[88]) Ibid., ad X.5.7.9, fol. 209, ∫ *Ad abolendam*, n. 2.

[89]) Johannes Andreae, Novellae (n. 47), vol. II, ad X.5.8.1, fol. 32, ∫ *Quod*; cp. Innocentius IV, In Quinque Libros Decretalium (n. 72), ad X.5.8.1, fol. 209–210, ∫ *Qvod a praedecessore*, n. 3.

[90]) Guido de Baysio, In Sextum Decretalium Commentaria (n. 35), ad VI.5.11, fol. 124, ∫ *De sententia excommunicationis*, n. 2.

[91]) Id., Rosarium (n. 17) ad X.3.5.7, fol. 91, ∫ *Praesenti*, n. 1; cp. Henricus de Segusia, Lectura (n. 16), vol. I, ad X.1.33.2, fol. 177, ∫ *Si quis*.

entails the spiritual death of the sinner. For the Canon lawyer, it results in his legal death. The legal significance of the excommunication is inextricably connected with its theological meaning. As '*peccatum nihil est*', so '*nichil fiunt homines cum peccant*', states Aquinas[92]). On a legal dimension, such '*nichil esse*' is the annihilation of the legal status of the heretic: for the law of the Church, he has ceased to exist ('*ad ecclesiam censetur esse mortuus*')[93]).

It is right in the case of the *vacatio sedis* due to the bishop's *indignitas* that we can fully appreciate the difference between heresy and schism. Despite heresy should operate *ipso facto,* for the reasons before discussed the heretical bishop retained his *iurisdictio* until formally excommunicated. Until then, the *capitulum* had to obey to the bishop, although heretic. On the point, the *Decretum* was remarkably straightforward and did not leave much room to subtle distinctions[94]):

ante tempus sententiae non licet clericis ab episcopo suo discedere

Criminosus and *hereticus* a bishop may be, echoes Teutonicus, '*tamen non liceret archidiacono vel alicui subiectorum ab eo discedere ante diffinitivam sententiam*'[95]). In the case of schism, on the contrary, there is no such tension within the legal system between 'being' and 'should be'. Schism operates *ipso iure.* In the very moment of his schism, the schismatic places himself outside the Church and it is no longer recognised by its law. Legally speaking, he has nothing to do with the rules governing the Body of Christ, because he does not belong to it any longer. A schismatic is dead.

In order to consider the bishopric as *vacans* when occupied by a schismatic bishop, a straightforward route was found in the *capitis deminutio maxima*. Any *civis* held prisoner by *hostes imperii* was held legally dead until liberated and restored into his previous position according to the *ius postliminium*. Just as he who embraced the religious life was to be considered *mortus mundo*, so the prelate kept *apud hostes* was legally dead. Initially, Canon lawyers dealt with the rather scholastic case of a bishop held *captivus* by the enemies of the Roman Empire. Yet the boundaries of the Empire were not merely geographi-

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92) Aquinas, De Malo (n. 23), q. II, p. 130.

93) Johannes Andreae, Novellae (n. 47), vol. II, ad X.3.6.6, fol. 31, ∫ *Consultationibus*; cp. Guido de Baysio, in Sextum (n. 35), ad VI.1.3.1, fol. 4, ∫ *Ipso iure*, n. 2; cp. C. 24, q. 2, c. 3.

94) C. 8. q. 4, c. 1.

95) Johannes Teutonicus, Decretum (n. 19), ad C. 22, q. 3, fol. 263, ∫ *Cum ergo*; cp. Guido de Baysio, Rosarium (n. 17), ad C. 24, q. 1, c. 39, fol. 321, ∫ *Svbdiaconus*, n. 1.

cal. As for the Civil lawyers the Empire extended over any *populus* abiding by the *ius civile*, so for the Canon lawyers the boundaries of the *Respublica christianorum* lay where the communion with the Church ended or was severed. Hence, in the *Liber Sextus* the bishop was subjected to *capitis deminutio maxima,* and so to legal death, not only when kept prisoner by *hostes imperii*, but also by pagans or – crucially – schismatics[96]). It is hard not to notice how the next logical step was the case where the bishop himself was schismatic, in that he voluntarily placed himself *extra ecclesiam*. So, as stated by several amongst the most pre-eminent Canon lawyers from the mid-thirteenth century onward[97]):

dum ecclesia habet pastorem […] *scismaticum vacare intelligitur*

Schismatics, being *ipso iure indigni*, could neither acquire nor retain any *dignitas*. Severing the communion with the Church, they placed themselves beyond its boundaries, becoming *extranei* to the very *locus* of validation of their *dignitas*. Not recognised anymore by the law of the Church, they became structurally unable to exercise any *iurisdictio* over their bishopric. For a new heresy, moral *indignitas* would result in legal *indignitas* only with its condemnation *ope sententiae*. The same was not true for schism, where no legal barrier stood between unworthiness and unfitness. Hence, in the very moment the bishop became schismatic, he would lose *ipso iure* his *dignitas*. A schismatic is dead to the Church, and a bishop is no exception to that principle. The moment the schismatic bishop is legally dead, his *sedis* becomes *ipso iure vacans*[98]).

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[96]) VI.1.8.3; cp. Johannes Andreae, ad librum Sextum (n. 78), ad VI.1.8.3, col. 205, ∫ *Si Episcopus*: '*cum Episcopus ipse captus ab infedelibus, vel schismaticis, censeatur mortuus* […] *quod si captus ab infidelibus dicitur seruus infidelium, et fingitur mortuus ciuiliter. Et sic habes hic casum, quo mors ciuilis aequiparatur morti naturali*', and ibid., ad VI.1.17., col. 274, ∫ *Vacante*.

[97]) Vincentius Hispanus, ad X.5.8.1, in: Johannes Andreae, Novellae (n. 47), vol. II, fol. 363, ∫ *Firmitate*. The same statement may be found almost verbatim in Bernardus Parmensis, Decretalium compilatio (n. 10), ad X.5.8.1, fol. 459, ∫ *Firmitate*; Johannes Andreae, Novellae (n. 47), vol. II, ad X.5.8.1, fol. 32, ∫ *Quod*; Henricus de Segusia, Lectura (n. 16), vol. II, ad X.5.8.1, fol. 282, ∫ *Si dicientes*; Alvarus Pelagius, De planctu Ecclesiae (n. 12), I.65, fol. 82. The main dissenting opinion was that of Guido de Baysio, In Sextum Decretalium Commentaria (n. 35), ad VI.1.3.6, fol. 7, ∫ *Svsceptum*, n. 2–3. It should be noted, however, that from a theological perspective Guido's position was the same as that of his opponents: see ibid., ad VI.5.11, fol. 124, ∫ *De sententia excommunicationis*, pr.–n. 2.

[98]) For a different reconstruction see Brian Tierney, Foundations of the Conciliar Theory, 3rd enlarged ed., Leiden 1998, p. 117–120.

VI. Conclusion

While in Civil law it is possible to separate – at least conceptually – positive law from legal theory, the same is not true for Canon law. In the law of the Church the *ius positum* has to be the logical prosecution of a theological and ecclesiological unitary discourse. The separation from the unity of the Church is at the same time theological (*deviatio a fide*), ecclesiological (*separatio ab ecclesia*) and legal (*destitutio a dignitate*). Severing the link with the Church in all these three levels, schism represents the fullest case of *divisio*[99]).

We have seen the tension existing within the legal system in the case of heresy. Applied in particularly serious contexts, such a tension could not be left unsolved: an immediate answer was called for by the very system. Such was the case of the heretical pope, where that tension was magnified up to the breaking point of the legal system itself. There cannot be a heretical pope yet to be judged. In the language of validity, such a pope does not exist anymore – he is dead ('*pro mortuo habetur*')[100]). His 'legal death', moreover, is coherent with the concept of *dignitas* in its 'functionalist' meaning. The pope is 'dead' because, being *devius a fide*, '*non potest esse caput Christianorum*'[101]). It is impossible (or rather unacceptable) that the highest *dignitas* be vested in the most *indignus* – the *devius a fide*. Such an unacceptable conflict between form and substance was the same in the heretical bishop, so the same solution was applied thereto. Legal death was well suited to translate such a *non posse* from the ethical dimension to the legal realm, and schism was the only viable option to trigger legal death *ipso iure*.

The 'mystical marriage' between bishop and Church lies on two levels because the Church is at the same time both the local and the universal one. In Canon law (particularly in times of growing claims of Rome's authority over the local churches) the bishop retained his jurisdiction over his bishopric as long as he remained in communion with the universal Church[102]). If this

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[99]) Ivo Carnotensis, Decretum, in: Id., Opera Omnia, Parisiis 1647, vol. I, pars V, c. 25, p. 140 (and now in Bruce Brasington/Martin Brett/Przemyslaw Nowak [eds.], available online, URL: <http://project.knowledgeforge.net/ivo/decretum/ivodec_5_1p4.pdf >): '*quicumque ab vnitate fidei vel societatis Petri Apostoli quolibet modo semetipsos segregant, tales nec vinculis peccatorum absolui, nec ianuam possunt coelestis regni ingredi.*'

[100]) John of Paris, Tractatus de potestate regia et papali, in: Melchior Goldast, Monarchia S. Romani Imperii, sive Tractatus de iurisdictione imperiali et pontificia, Francofordiae 1621, vol. II, c. 24, p. 146, line 2.

[101]) Ibid., lines 1–2.

[102]) Henricus de Segusia, Lectura (n. 16), vol. I, ad X.1.6.25, fol. 54, ∫ *Cum*

'higher' communion was broken, the bishop would become *ipso iure* extraneous to his own church as well. Schism, as we have seen, is the separation from the Church, the 'one and indivisible' Body of Christ. The *ipso iure* loss of jurisdiction of the schismatic bishop was ultimately a product of the indivisibility of the Church. Just as heresy, schism was considered qualitatively different from the other sins because of its gravity. But, unlike heresy, schism was visible and tangible, and because of its 'tangibility', being *habitus* and not *dispositio,* it ought to produce tangible effects. The mere possibility of 'modulating' the legal consequences of schism on the bishop's authority (that is, considering his *iurisdictio* illegitimate but still valid) would have tangibly disproved the indivisibility of the 'mystical body' of the Church itself. From this perspective, the *ipso iure* anathema against the bishop-schismatic amounted but to a natural and necessary consequence of the very structure of the Church. The case of the heretical pope paved the way to the *ipso iure* legal death on a theoretical and conceptual level; that of the schismatic bishop made it viable on a more practical basis.

vitonienses. See Orazio Condorelli, Principio elettivo, consenso, rappresentanza: itinerari canonistici su elezioni episcopali, provvisioni papali e dottrine sulla potestà sacra nei secoli XII–XIV, Rivista Internazionale di Diritto Comune [RIDC] 12 (2001), p. 163–247, at p. 189–191, where further bibliography can be found.